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A.

**STATE'S RESPONSE TO APPELLANT'S ASSIGNMENTS OF
ERROR**

1. Mr. Rieken's conviction does not violate the Fourteenth Amendment right to due process.
2. The trial court's "to convict" instruction did not omit an essential element.
3. The trial court did not err by giving Instruction No. 10.
4. Mr. Rieken was not denied his constitutional right to a jury trial because the jury did determine the identity of the substance he possessed.
5. Mr. Rieken was not denied his constitutional right to a jury determination of all facts that increased the penalty for his offense.
6. The trial court properly sentenced Mr. Rieken.
7. No prosecutorial misconduct occurred during the trial that infringed Mr. Rieken's constitutional right to due process.
8. The prosecutor correctly stated the burden of proof was correctly stated during closing argument.
9. The prosecutor correctly stated that acquittal for unwitting possession required the jury to "entirely disregard" the trooper's testimony.
10. The prosecutor correctly stated that acquittal for unwitting possession required jurors "to be 51 percent sure that the defendant is telling the truth. . ." RP 53.
11. Mr. Rieken was not denied his Sixth and Fourteenth Amendment right to effective assistance of counsel.
12. Defense counsel was not ineffective by failing to object because no prosecutorial misconduct occurred.

B.

**STATE'S RESPONSE TO APPELLANT'S ISSUES PERTAINING
TO ASSIGNMENTS OF ERROR**

1. The identity of a controlled substance is an essential element of Possession of a Controlled Substance. It is not an error to fail to include the specific identity of the controlled substance in the "to convict" jury instruction where, as here, the instructions incorporate the drug identity by reference to the charging document, which specified methamphetamine, and where that drug and only the presence of that drug was proven at trial.
2. A sentencing judge may not impose a sentence beyond that authorized by the jury's verdict. In this case the jury found Mr. Rieken guilty of possession of methamphetamine and sentenced him to a standard range sentence.
3. A prosecutor may not make an argument that misstates the burden of proof. Here, the prosecutor correctly stated the burden of proof for the affirmative defense of unwitting possession.
4. The Sixth and Fourteenth Amendments to the U.S. Constitution guarantee an accused person the right to the effective assistance of counsel. Here no prosecutorial misconduct occurred; therefore, defense counsel's failure to object is irrelevant.

C.

STATEMENT OF THE CASE

On July 26, 2008, Michael Rieken, was operating a motor vehicle eastbound on State Route 8 near mile post 8. RP 5-6. Trooper Justin Eisfeldt stopped the vehicle for excessive speed. RP 5. The Trooper Eisfeldt arrested Mr. Rieken for Driving While License Suspended in the Third degree. RP 8. Trooper Eisfeldt conducted a search of the defendant

pursuant to a lawful arrest and located a blue plastic container in Mr. Rieken's right pants pocket. RP 9. The blue container was the diameter of a round container of chewing tobacco and about half as thick as a round container of chewing tobacco. RP18. Mr. Rieken informed Trooper Eisfeldt as follows regarding the blue plastic container: "It's meth. I forgot it was in my pocket." RP 10. At no time did Mr. Rieken deny knowledge of the methamphetamine that was found on his person. RP 11. Neither Mr. Rieken nor his girlfriend made any statements at the scene that indicated that he was wearing somebody else's pants. Prior to this incident Trooper Eisfeldt had never met Mr. Rieken. RP 13-14.

Mr. Rieken was charged with possession of a Controlled Substance methamphetamine. CP 1.

Rebecca Brewer of the Washington State Patrol Crime Lab testified at trial that the substance was indeed methamphetamine. RP 19-29. None of the witnesses testified that the substance was anything other than methamphetamine. No other controlled substances are mentioned during the entire proceedings of this case. RP *Passim*

Michael Rieken and his girlfriend testified at trial that he was wearing somebody else's pants on the day that he was arrested. RP 35, 45. Mr. Rieken and his girlfriend testified that Mr. Rieken informed Trooper Eisfeldt that he was wearing somebody else's pants and denied

any knowledge of the methamphetamine that was found on his person. RP 35, 45.

On redirect after Mr. Rieken and his girl friend had given their self-serving uncorroborated testimony, Trooper Eisfeldt testified that Mr. Rieken had never told him that he was wearing somebody else's pants. RP 47. Trooper Eisfeldt also reaffirmed that Mr. Rieken had told him that the substance was methamphetamine and the Mr. Rieken had forgotten about it. RP 47.

The "to convict" instruction given by the trial court read as follows:

To convict the defendant of the crime of Possession of a Controlled Substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about July 26, 2008, the defendant possessed a controlled substance; and

(2) That the acts occurred in the State of Washington. If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. 10, Court's Instructions to the Jury, Supp. CP.

Instruction number 9 informed the jurors that "methamphetamine is a controlled substance." Instruction 9, Court's Instructions to the Jury, Supp. CP. Instruction number 3 referenced the charging document and

informed the jury the Mr. Rieken had been charged with one count of possession of a controlled substance methamphetamine. Instruction 3, Court's Instructions to the Jury, Supp. CP. Mr. Rieken requested and received the a jury instruction of on the affirmative defense of unwitting possession. Instruction 11 Court's Instructions to the Jury, Supp. CP.

The deputy prosecuting attorney began his closing argument by discussing witness credibility. The relevant passage reads as follows:

Instruction Number 1, the law indicates that you're the sole judges of the credibility for each witness and the evidence that you've heard. You can look at the manner in which the witness testified and any personal interest that a witness might have in the outcome as to this case. Well, testimony that we've heard here today is Trooper Eisfeldt in this case never met this people before, never met them. He doesn't have any bias or prejudice as far as the outcome of this particular case. I would suggest to you that the defendant and his girlfriend of the last five years have an interest of prejudice in the outcome of this case. This instruction also indicates that you can waive the reasonableness of the witness's statements in the context of the other evidence. Well, the State would suggest to you that the self-serving statements of the defendant and the defendant's witness just simply are not reasonable. And that's entirely your call based upon the observations that you made today here while you observed the witnesses testifying. RP 51, 52.

The deputy prosecutor went on to remind the jury of the elements of the defense of unwitting possession.

I either didn't know what it was or didn't know that I had it. He wasn't aware of a container, the size of apparently a Skoal can in diameter that was in his pocket. You have to find that believable. You have to find it believable that he

didn't know what the substance was. You have to entirely disregard the testimony of the trooper in this case to reach that conclusion. And by asserting the unwitting possession defense, the defendant hasn't admitted to every element of the crime and asking you to believing that he didn't know that this item was in his possession. I would also point out that, pursuant to this instruction, if you're 50 percent sure the defendant is telling the truth in this case then it's your duty as jurors to find him guilty, because he has the burden of persuasion, you have to be 51 percent sure that the defendant is telling the truth in this case to find him not guilty. RP 53.

Mr. Rieken's attorney argued that her client's possession was unwitting. RP 54-57. Mr. Rieken's attorney also asserted that her client never confessed to the crime and that Trooper Eisfeldt could not remember if Mr. Rieken had told him that he was wearing somebody else's pants. RP 54-57. The prosecuting attorney responded with the following rebuttal.

You have to really ask yourself defense's theory of this case is, why would the trooper make this up? Because that's essentially what they're asking you to believe is that trooper brought up here today, he never said the meth is his. You're just supposed to take Mr. Rieken's word for that. Third question on redirect Trooper Eisfeldt indicated that at no time did the defendant or anybody else ever tell them that those weren't his clothes. And there's really no reason the trooper in this case to tell anything but the truth. He doesn't know these people. The story is just simply by defense counsel not believable. Thank you. RP 57.

Predictably, the jury chose to believe Trooper Eisfeldt's version of events rather than the self-serving statement of Mr. Rieken and his

girlfriend. Mr. Rieken was found guilty of the crime of possession of a controlled substance as charged. Verdict Form A, supp. CP. The court sentenced Mr. Rieken to a standard range prison sentence for possession of methamphetamine based on Mr. Rieken's three prior felonies. CP 3-11, 12.

D.

ARGUMENT

1. BASED ON THE RECORD IT WAS NOT ERROR TO OMIT THE NAME OF THE CONTROLLED SUBSTANCE FROM THE "TO CONVICT" INSTRUCTION.

State v. Sibert, __ Wn.2d __ , __ P.3d __, (2010), is controlling authority in this case. The Supreme Court of this State held that it was not error to omit the name of the controlled substance from the "to convict" instruction when the record puts both the jury and the defendant on notice of the identity of the controlled substance crime charged.

The record in the present case reflects that the charging document specifically identified the controlled substance as methamphetamine. CP 1. No other controlled substance was listed in the information. CP 1. The jury instructions referenced the charging document and the "to convict" instruction properly list the elements of the crime charged. Instruction Nos. 3, 9, 10 , Court's Instructions to the Jury, Supp CP.

Methamphetamine was the only controlled substance listed in the jury instructions. Court's Instructions to the Jury, Supp CP. Methamphetamine was the only controlled substance proven by the prosecution beyond a reasonable doubt. RP 19-29. Methamphetamine was the only controlled substance mentioned by anyone in every hearing that occurred in this case let alone closing arguments.

Under these facts and the holding in *Sibert*, it is clear that no error occurred with regard to the "to convict" instruction. Reversal and remand for a new trial is not appropriate. Furthermore, Mr. Rieken's argument that his sentence is excessive and that the case must be remanded for a new sentencing hearing fails for the reasons already discussed. *Appellant's Brief* at 7.

2. NO PROSECUTORIAL MISCONDUCT OCCURRED DURING CLOSING ARGUMENT; THEREFORE, THE STATE DID NOT VIOLATE MR. REIKEN'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS

- a. Mr. Rieken must meet a higher standard if raising a prosecutorial misconduct claim because he failed to object to the deputy prosecutor's statements during closing arguments.**

1. Legal Standard.

Because Mr. Rieken did not object at trial, he may raise this issue for the first time on appeal only if (1) the error was manifest and affected a constitutional right to a fair trial by shifting the burden of proof; RAP

2.5(a), *State v. Jones*, 71 Wn.App. 798, 809-810, 863 P.2d 85 (1993), or (2) the prosecutor's conduct was "so flagrant and ill-intentioned that it could not be neutralized with a curative jury instruction," *State v. Henderson*, 100 Wn.App. 794, 800, 998 P.2d 907 (2000) See also *State v. Gregory*, 158 Wn. 2d 759, 808 n. 24, 147 P.3d 1201 (2006). For the reasons delineated below Mr. Rieken's contentions are without merit.

2. Mr. Rieken cannot show manifest error that affected a constitutional right.

An appellant must do more than identify a constitutional error; he must show that the asserted error is "manifest," i.e., the alleged error must appear on the record and must have actually affected his rights. RAP 2.5(a); *State v. McFarland*, 127 Wash.2d 322, 333, 899 P.2d 1251 (1995), (citing *State v. Scott*, 110 Wash.2d 682, 688, 757 P.2d 492 (1988)). This is a narrow exception. *State v. Nguyen*, 165 Wash.2d 428, 197 P.3d 673 (2008). An Appellate court makes an initial assessment of the merits of the claimed constitutional error to determine whether the argument is likely to succeed. *State v. Kirwin*, 165 Wash.2d 818, 203 P.3d 1044 (2009).

Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the

evidence discussed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wash.2d 559, 578, 79 P.3d 432 (2003).

In this case Mr. Rieken cannot show manifest error of an affected a constitutional right. The State contends that neither of the errors alleged by Mr. Rieken amount to any error at all, let alone manifest error or an affected a constitutional right. Mr. Rieken's claim is based on a total of fifteen words taken out of context located within a transcript of 55 pages. The statements that Mr. Rieken complains of are benign and fleeting because the jury received proper jury instructions his argument fails.

3. Mr. Rieken cannot show the conduct of the deputy prosecutor was "so flagrant and ill-intentioned that it could not be neutralized with a curative jury instruction.

Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect. *State v. Russell*, 125 Wash.2d 24, 85, 882 P.2d 747 (1994). Reversal is not required if the error could have been obviated by a curative instruction that the defense did not request. *Id.*

The absence of a contemporaneous objection strongly suggests that the comments did not appear critically prejudicial to the defendant in the context of trial. *State v. Swan*, 114 Wash.2d 613, 661, 790 P.2d 610 (1990). When the defendant fails to object to a comment made by the

prosecutor in closing argument, even a comment that touches on a constitutional right, the alleged misconduct will not be reviewed unless the comment is so flagrant and ill intentioned as to cause an enduring and resulting prejudice that could not have been remedied by a curative instruction to the jury. *State v. Smith*, 144 Wash.2d 665, 679, 30 P.3d (2001); *State v. French*, 101 Wash.App. 380, 386-88, 4 P.3d 857 (2000).

In this case the statements made by the deputy prosecuting attorney were not so flagrant and ill-intentioned that it could not be neutralized with a curative jury instruction. The deputy prosecutor correctly stated the burden of proof regarding the affirmative defense of unwitting possession. Mr. Rieken had the burden of proving the defense of unwitting possession by a preponderance of the evidence. The deputy prosecutor correctly stated that in order to find the defense of unwitting possession the jury had to entirely disregard the testimony of the trooper in this case to reach the conclusion that Mr. Rieken's possession was unwitting.

Even assuming arguendo that the deputy prosecutor's remarks "crossed the line", the alleged error does not constitute flagrant and ill-intentioned behavior. Any purported prejudice could easily have been remedied by a curative instruction to the jury. Hence, the Appellant's argument does not pass muster.

b. The deputy prosecutor's statements during closing argument do not amount to prosecutorial misconduct.

Mr. Rieken alleges that it is prosecutorial misconduct to argue that acquittal requires the jury to “entirely disregard” the trooper’s testimony in the context of unwitting possession. Mr. Rieken reliance on *State v. Casteneda-Perez*, 61 Wn.App. 354, 810 P.2d 74 (1991), and *State v. Fleming*, 83 Wn.App. 209, 921 P.2d 1076 (1996) is inapposite because these cases are factually distinguishable from the instant case. *Casteneda Perez* concerned the impropriety of a prosecutor asking a defendant and other defense witnesses whether police officers who contradicted their testimony were lying. *Fleming* was a rape case in which a prosecutor argued that: (1) in order for the jury to find the defendants not guilty, it would have to find that the victim either lied or fantasized the rape; and (2) defendant's failure to testify amounted to a failure to establish reasonable doubt. Although both cases, involved prosecutorial misconduct, neither case pertains to a situation where a defendant testified and asserted an affirmative defense of unwitting possession.

In this case not only did Mr. Rieken testify and claim unwitting possession, he also called other witnesses to persuade the jury that his actual possession was unwitting. In claiming unwitting possession, Mr.

Rieken assumed the burden of proving the defense by a preponderance of the evidence. *State v. Balzer*, 91 Wn.App. 44, 67, 954 P.2d 931, *review denied*, 136 Wn.2d 1022 (1998). The trial court correctly instructed the jury that Mr. Rieken bore this burden. Once Mr. Rieken assumed this burden, the State was entitled during closing to challenge the credibility and sufficiency of Mr. Rieken's affirmative defense.

Additionally, the State did not indicate that the trooper was lying or mistaken as Mr. Rieken now claims. The State informed the jury that it had to entirely disregard the testimony of the trooper in this case to reach the conclusion that his possession was unwitting. The State reminded the jurors that they were to sole judges of credibility of the witnesses and could take into consideration any interest of bias the witnesses might have. RP 51. The State reminded the juror's that the trooper had never met the defendant before and was neither bias nor prejudice toward the defendant. RP 51. In the context of the entire closing and the fact that the Trooper indicated that Mr. Rieken confessed an allegation that Mr. Rieken contested the State's closing was appropriate.

Mr. Rieken's also argues that the State misstated the burden of proof for unwitting possession by informing the jurors during closing that they "[had] to be 51 percent sure that the defendant is telling the truth . . ."

RP 53. Mr. Rieken has taken a very small portion of the State's closing

out of context and attempted to raise it to the level of prosecutorial misconduct. Immediately preceding this sentence the State indicated that if the jurors were 50 percent sure the defendant was telling the truth that the possession of methamphetamine was unwitting, it was their duty to find him guilty because he has the burden of persuasion . . .” RP 53.

Mr. Rieken argues that the deputy prosecutor improperly raised the bar of the affirmative defense from “more probable than not” to 51 percent. Appellant Brief at 9. This argument is specious because the use of the phrase “51 percent” is just a colloquially way of saying “more than 50 percent.” Consequently, the deputy prosecutor did not misstate the Appellant’s burden of proof.

If the court somehow determines that these statements amount to prosecutorial misconduct, the state argues that it is a harmless error because the court provided proper jury instructions regarding witness credibility and unwitting possession. Juries are presumed to follow the courts instructions. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). The conduct complained of relates to a sum total of benign two words during an entire felony trial and a fraction of a percentage out of one hundred. Constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is

so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222 P.3d 1 (2008). The State argues that the statements complained of by Mr. Rieken are the definition of harmless error.

Finally, the authority cited by Mr. Rieken is less than compelling. Mr. Rieken cites *State v. Flores*, 164 Wn.2d 1, 25, 186 P.3d 1038 (2008), and argues that where prosecutorial misconduct infringes on a constitutional right, prejudice is presumed. Appellant's Brief at 8. The State takes issue with two things regarding this citation. Firstly, Mr. Rieken makes reference to a dissenting opinion. Secondly, the words "prosecutorial misconduct" appear nowhere in the entire text of this opinion, including the dissent.

3. MR. RIEKEN'S DEFENSE COUNSEL WAS EFFECTIVE.

Ineffective assistance of counsel is analyzed using a two prong test: (1) was counsel's performance deficient; and (2) did the deficient performance prejudice the defense *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). If the defendant fails to establish either prong of the test, the claim must be rejected. *State v. Lord*, 117 Wash.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

a. The performance of appellant's counsel was objectively effective.

Counsel's performance is deficient if it falls below an objective standard of reasonableness based on the totality of the circumstances. *State v. Stough*, 96 Wash.App. 480, 485, 980 P.2d 298 (1999). There is a strong presumption that counsel's representation was effective. *State v. Townsend*, 142 Wash.2d 838, 843, 15 P.3d 145 (2001). The defendant bears the burden to show from the record a sufficient basis to rebut the "strong presumption" that counsel's representation was effective. *State v. McFarland*, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995).

Mr. Rieken alleges that his counsel was deficient for failing to object to improper closing argument. As stated above, nothing about the comments that Mr. Rieken now complains of was improper. Therefore, Mr. Rieken's claim of ineffective assistance of counsel must fail.

b. The appellant was not prejudiced by his counsel's performance.

Even if appellant could show that his counsel's performance was deficient, the appellant would still have to show that the deficient performance was prejudicial. *Stough*, 96 Wash.App. at 485-86 A deficient performance by defense counsel results in prejudice when there is "a reasonable possibility that, but for the deficient conduct, the outcome

of the proceedings would have been differed. *State v. Reichenbach*, 153
wn.2d 126, 130, 101 P.3d 80 (2004).

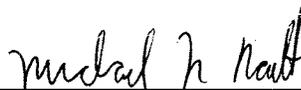
For the reasons listed above, the State argues that even if the court
were to find that counsel's failure to object constituted deficient
performance, this deficiency would not have changed the outcome of the
trial. Consequently, the second prong of the *Strickland* test is not met; the
ineffective assistance of counsel allegation has no merit.

E.

CONCLUSION

For the reasons listed above, the Appellant's assignments of errors
should be rejected and the relief sought by the Appellant should be denied.
The Appellant's conviction for possession of a controlled substance
(methamphetamine) should be upheld.

RESPECTFULLY SUBMITTED:



MICHAEL N. ROTHMAN
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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

No.: 39644-1-II

v.

DECLARATION OF MAILING

MICHAEL RIEKEN,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 12th day of April, 2010, I mailed a copy of the Respondent's Brief to Jodi R. Backlund and Manek R. Mistry; Backlund & Mistry; 203 Fourth Avenue East, Suite 404; Olympia, WA 98501-1189, and Michael Rieken 903082; 410 - 4th Avenue; Seattle, WA 98104, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 12th day of April, 2010, at Montesano, Washington.

Barbara Chapman